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Tho Yow Pew & Anor v Chua Kooi Hean

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-156 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
13 JUNE 2002

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Succession *— Probate — Testamentary capacity — Whether suspicious circumstances related to circumstances surrounding the making of the will only and not circumstances surrounding the testamentary capacity of the testator — Trial judge held that there were suspicious circumstances relating to the testamentary capacity of the testator — Whether there was a misdirection of law*

C

Pursuant to Dr Tho Yow Cheong's ('the testator') last will and testament, he bequeathed RM1 to his wife and devised a 60%, 20% and a further 20% share to his mother, his daughter and his son respectively in the half share owned by him in the property known as No 27, Lorong Batai, Damansara Heights, Kuala Lumpur ('the
D matrimonial home'). The testator appointed his two brothers as the executors and trustees of his estate. Upon the testator's death, his executors and trustees applied for grant of probate. Prior to his death, the testator was receiving treatment for nose cancer. To alleviate the headache he was suffering, he administered unto himself several drugs. At about the time when he was undergoing treatment, he
E became estranged from his wife and left the matrimonial home to stay with his mother and his younger brother. He then presented a petition for divorce. Subsequently, the testator executed his will in the presence of two witnesses. The testator's wife ('the respondent'), being unhappy with the will, challenged it and entered a caveat in the
F probate registry. Subsequently, the executors and trustees took out a writ to propound the will to have it declared valid. The respondent was cited as the defendant in those proceedings. She counterclaimed for a pronouncement against the validity of the will. The action was tried and the trial judge dismissed the executors' claim and granted the relief sought by the defendant in her counterclaim. The principal
G ground on which the trial judge granted the counterclaim related to the testator's testamentary capacity. On the basis of the evidence before him, the trial judge held that the testator lacked testamentary capacity. The trial judge also held that there were suspicious circumstances relating to the testamentary capacity of the testator. This was the appeal by the executors and the trustees.

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Held, allowing the appeal:

(1) The law upon the subject of a testator's testamentary capacity is well settled. The decided cases showed quiet clearly that very slight testamentary capacity was required for the making of a will.
I The cases in which wills had been held invalid for lack of testamentary capacity involved testators who were utterly insane. What the law required to vitiate testamentary capacity was

an insane delusion existing at the time of making of the will or at the time of giving instructions for the making of the will (see pp 100I–101A). A

(2) If the propounder of a will wished to succeed in obtaining probate, he must, upon challenge being taken, establish testamentary capacity and dispel any suspicious circumstances surrounding the making of the will. Suspicious circumstances, in the context of wills, relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator (see p 103E). B

(3) In the instant case, the trial judge had addressed his mind to what he termed as 'suspicious circumstances relating to the testamentary capacity of the testator'. This approach clearly fell outside both principle and authority and was a misdirection of law. Accordingly, the demands of the justice of this case required a re-trial of the action before another court (see pp 103G, 104B). C

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[Bahasa Malaysia summary

Menurut wasiat dan pesanan akhir Dr Tho Yow Cheong ('pewasiat'), beliau telah mewasiatkan RM1 kepada isterinya dan membahagikan sebanyak 60%, 20% dan tambahan sebanyak 20% kepada ibu, anak perempuan dan anak lelakinya masing-masing separuh bahagian yang dimilikinya dalam hartanah yang dikenali sebagai No 27, Lorong Batai, Damansara Heights, Kuala Lumpur ('rumah kediaman'). Pewasiat telah melantik dua adik-beradik lelakinya sebagai wasi dan pemegang amanah harta pusakanya. Apabila pewasiat meninggal, wasi dan pemegang amanah bagi pihaknya telah memohon geran probet. Sebelum meninggal dunia, pewasiat telah dirawat untuk penyakit barah hidung. Untuk melegakan sakit kepala, beliau telah mengambil pelbagai jenis ubat. Kira-kira pada masa beliau menjalani rawatan, beliau telah berpisah dari isterinya dan meninggalkan rumah kediamannya untuk menetap dengan ibu dan adik lelakinya. Beliau kemudiannya mengemukakan petisyen untuk perceraian. Berikutnya, pewasiat melaksanakan wasiatnya di hadapan dua orang saksi. Isteri pewasiat ('responden'), yang tidak puas hati dengan wasiat tersebut, mencabar wasiat tersebut dan memasukkan kaveat dalam daftar probet. Berikutnya, wasi dan pemegang amanah mengambil writ untuk mengajukan wasiat supaya ia diisytiharkan sah. Responden disaman sebagai defendan dalam prosiding tersebut. Beliau menuntut balas untuk satu perisytiharan terhadap kesahihan wasiat tersebut. Tindakan tersebut dibicarakan dan hakim perbicaraan menolak tuntutan wasi-wasi dan memberikan relif yang dipohon oleh defendan dalam tuntutan balasnya. Alasan utama hakim perbicaraan membenarkan tuntutan balas tersebut adalah berhubung dengan keupayaan pewasiat untuk membuat wasiat. Berdasarkan keterangan di hadapannya, hakim perbicaraan memutuskan bahawa pewasiat tidak mempunyai keupayaan membuat wasiat. Hakim perbicaraan

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juga memutuskan bahawa wujudnya keadaan yang mencurigakan berhubung dengan keupayaan pewasiat untuk membuat wasiat. Ini merupakan rayuan oleh wasi-wasi dan pemegang amanah.

Diputuskan, membenarkan rayuan tersebut:

(1) Undang-undang mengenai keupayaan perwasiatan pewasiat telahpun ditetapkan. Kes-kes yang diputuskan menunjukkan dengan jelas bahawa cuma sedikit keupayaan untuk membuat wasiat diperlukan untuk pembuatan satu wasiat. Kes-kes di mana wasiat-wasiat diputuskan tidak sah oleh kerana tiada upaya perwasiatan termasuk pewasiat yang tidak siuman. Apa yang dikehendaki oleh undang-undang untuk melemahkan keupayaan membuat wasiat adalah satu delusi tidak siuman yang wujud semasa wasiat dibuat atau semasa memberi arahan untuk membuat wasiat (lihat ms 100I–101A).

(2) Sekiranya pihak yang mengaju suatu wasiat ingin berjaya dalam memperolehi probet, beliau mestilah, atas cabaran yang diambil, membuktikan keupayaan pewasiat membuat wasiat dan melenyapkan sebarang keadaan syak di sekeliling pembuatan wasiat. Keadaan syak, dalam konteks wasiat, berkait dengan keadaan dalam mana wasiat dibuat, bukan keadaan berkenaan dengan keupayaan pewasiat untuk membuat wasiat (lihat ms 103E).

(3) Dalam kes ini, hakim perbicaraan telah menumpu perhatian kepada apa yang beliau sifatkan sebagai 'suspicious circumstances relating to the testamentary capacity of the testator'. Pendekatan ini jelas di luar rangkuman prinsip dan nas dan dengan itu merupakan satu salah arahan undang-undang. Oleh itu, keadilan kes ini menuntut bahawa tindakan ini dibicarakan semula di hadapan mahkamah lain (lihat ms 103G, 104B).]

Notes

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1998–2006.

Cases referred to

Henry Waring v Thomas Waring 13 ER 715 (refd)
Judah v Isolyne Bose 1945 AIR PC 174 (refd)
Sarat Kumari Bibi v Rai Sakhi Chand 1929 AIR PC 45 (refd)
Wintle v Nye [1959] 1 ALL ER 552 (refd)

Appeal from: Civil Suit No S2–22–474 of 1997 (High Court, Kuala Lumpur)

Karin Lim (*A Suppiah* with her) (*Presgrave & Matthews*)

Joy Appukuttan (*David Lee* with him) (*SK Yeoh & Partners*) for the respondent. A

Gopal Sri Ram JCA (delivering the judgment of the court): As long ago as 20 October 1995, Dr Tho Yow Cheong made his last will and testament. In it he bequeathed RM1 to his wife and devised a 60%, 20% and a further 20% share to his mother, his daughter and his son respectively in the half-share owned by him in the property known as No 27, Lorong Batai, Damansara Heights, Kuala Lumpur. He then devised and bequeathed the residue of his estate to his sister. By the same said will, Dr Tho, whom we shall for convenience refer to as the 'testator', appointed his two brothers as his executors and trustees of his estate. In June 1997, the executors and trustees applied for grant of probate. The testator's wife was unhappy with the will. She challenged it. She entered a caveat in the probate registry. B C

Later, the executors and trustees as plaintiffs took out a writ to propound the will to have it declared valid. The wife was cited as the defendant in those proceedings. She counterclaimed for a pronouncement against the validity of the will. Subsequently, the action was tried. Witnesses were called on both sides and the learned judge in a reserved judgment dismissed the executors' claim and granted the relief sought by the defendant in her counterclaim. D

The principal ground on which the learned judge granted the counterclaim related to the testamentary capacity of the testator. He held on the basis of the evidence before him that the testator lacked the required testamentary capacity. He also held that there were suspicious circumstances relating to the testamentary capacity of the testator. E

The brief facts of the case are that in 1984, the testator was diagnosed as having nasopharyngeal carcinoma (nose cancer). He became quite ill. He sought and received treatment. He administered unto himself several drugs to alleviate the headache he was suffering. He was obviously in excruciating pain. At about the time when he was undergoing treatment, it appears that he became estranged from his wife, the respondent. He left the matrimonial home, which is the subject matter of the gift we referred to earlier. He went to stay with his mother and his younger brother. He presented a petition for divorce. There is some correspondence from him about the unhappy state of his marriage. On 20 October 1995, the testator executed his will in the presence of two witnesses. Both were classmates of the first appellant and friends of the testator. There is a suggestion by the appellants that sufficient evidence was led before the learned judge to establish testamentary capacity. Counsel for the respondent has taken us through parts of the evidence, which, he says, throws doubt on the appellants' case. In view of the orders we propose to make in this appeal, we find it best to refrain from making any comments on the facts of this case. We find it sufficient for present purposes to deal with the learned judge's judgment on testamentary capacity. F G H

Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in I

A which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.

What the law requires to vitiate testamentary capacity is an insane B delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here. We would merely refer to three.

In *Judah v Isolyne Bose* 1945 AIR PC 174, Lord Goddard when delivering the advice of the Privy Council held that the mere fact that the C testatrix was unwell when she executed her will was a long way from saying that she had no testamentary capacity.

In *Williams on Wills* (7th Ed) at p 35, the editors of this leading text upon the subject make the following statement:

D (i) Criterion of sound disposing mind

Sound testamentary capacity means that three things must exist at one and the same time: (i) the testator must understand that he is giving his property to one or more objects of his regard; (ii) he must understand and recollect the extent of his property; (iii) he must also understand the nature and extent of the claims upon him both of those whom he is E including in his will and those whom he is excluding from his will. The testator must realize that he is signing a will and his mind and will must accompany the physical act of execution. It is said that perversion of moral feelings does not constitute unsoundness of mind in this respect, but this is really a matter of degree. The criterion to be applied has been thus stated by Cockburn CJ in *Banks v Goodfellow* LR 5 QB 549 at p 565:

F 'It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent G the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'

The mere fact that the testator was eccentric or was subject to one or more delusions is not of itself sufficient. It must be shown that the H delusion had, or was calculated to have, an influence on testamentary dispositions. A will has been held good subject to the deletion of a clause affected by the delusion.

Pausing for a moment, we observe that in footnote 3 at p 36 of this text, the editors throw doubt on the correctness of the decision in *Henry Waring v* I *Thomas Waring* 13 ER 715, an authority cited to us by counsel for the respondent.

The second passage we cite from the same work reads as follows:

(ii) Presumption of sound disposing mind

It is presumed that the testator was sane at the time when he made his will but, if the question of his sanity is contested, the onus is on the person propounding the will to prove that the testator was of sound disposing mind at the time when he made his will. While there must be a vigilant examination of all the evidence, if the court feels there is no doubt substantial enough to defeat a grant of probate, the grant must be made. Complete proof of capacity or even proof beyond reasonable doubt is not essential. A will not irrational on its face, duly executed, is admitted to probate without proof of competence unless such competence is contested. The law presumes that a state of things shown to exist continues to exist unless the contrary is proved and thus a testator, when there is no suggestion of insanity, is presumed to have remained sane; and, on the other hand, if there is evidence of insanity at a time prior to the making of the will, the person propounding the will must prove competence at the relevant time.

In the latter case, the presumption in the first instance is against sanity especially where the will contains dispositions which are prima facie not such as an ordinary testator would make. Such presumption as there is, is always affected by the provisions of the will itself. If these are such as a sane person would make, and still more, if the will is drawn by the testator himself, the will can be held valid. If the dispositions are irrational, the presumption is against the will.

The third passage in the same text is at p 39:

(iii) Delusions

For the will to stand the testator's mind must not be dominated by an insane delusion so as to overmaster his judgment to such an extent that he is incapable of disposing of his property reasonably and properly or of taking a rational view of the matters to be considered in making a will.

It cannot be said that there are people who are not suffering from delusional insanity but are incapable of making a will. A testator may be stated by medical evidence to have recovered from delusions, and yet the will be pronounced against on the ground that the onus of proof has not been discharged, even where the dispositions are probable. The court may grant probate of will and codicil with the deletion of one clause from the codicil which has been affected by a delusion. A pretended delusion assumed for the purpose of deception will not invalidate a will.

The third authority which we will refer to is *Theobald on Wills* (15th Ed) at p 31 under the heading 'Test of testamentary capacity':

In order to have testamentary capacity, a testator must understand:

(a) the effect of his wishes being carried out at his death, though it is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form;

(b) the extent of the property of which he is disposing; and

(c) the nature of the claims on him. The testator must have 'a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him, so that he can decide whether or not to give each of them any part of his property by his will.

> The same test applies whether the testator has been subnormal from birth or has suffered impairment of the mind during his lifetime, whether through injury, physical or mental illness, senility or addiction.

The second passage from the same text is at p 36 under the heading 'suspicious circumstances':

> If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where a person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person.
>
> However circumstances can only raise a suspicion of want of knowledge and approval if they are 'circumstances attending, or at least relevant to, the preparation and execution of the will itself'.

It is clear from the foregoing passages, in particular from the passages in *Theobald on Wills* that suspicious circumstances in the context of wills relates to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. In other words, if the propounder of a will wishes to succeed in obtaining probate, he must upon a challenge being taken, establish (a) testamentary capacity; and (b) dispel any suspicious circumstances surrounding the making of the will.

An illustration of the latter is to be found in the case of *Wintle v Nye* [1959] 1 All ER 552 where the solicitor who drafted the will for a 66-year old lady and who had been her legal adviser for several years was a substantial beneficiary under that will. Another illustration is to be found in the case of *Sarat Kumari Bibi v Rai Sakhi Chand* 1929 AIR PC 45, where the writer of the will had taken a very active part in its preparation and had obtained a substantial advantage under it.

In the present case, the learned judge addressed his mind to what he termed as suspicious circumstances relating to the testamentary capacity of the testator. That approach falls well outside both principle and authority. It is a misdirection of law. Whether the learned judge would have come to the same conclusion had he applied the correct test is something we are unable to say. Whether indeed the testator in the present case had testamentary capacity upon a proper consideration of the evidence and upon a proper direction of the law by the trial judge unto himself is a question we do not think is within our realm. It will be wholly inappropriate in our judgment, for us to enter upon this issue because we have neither seen nor heard the witnesses. Indeed, if we do attempt to resolve this issue we would be arrogating to ourselves powers we really do not have or if we had we ought not to exercise on the peculiar facts and circumstances of the instant case.

But that is not the end of the matter.

Mr Joy Appukuttan, in the course of his careful and well argued response to this appeal, drew our attention to passages in the evidence and to documents that are highly relevant to the question whether there were suspicious circumstances surrounding the making of the will. These highly relevant facts were never considered by the learned judge. Had he done so, our task would have been made fairly simple.

Having regard to the totality of the evidence and weighing it against the misdirection by the learned judge, we consider that the order that meets the demands of the justice of the case is to direct a re-trial of the action before another court. Upon the re-trial, all issues are to be at large, including the issue of testamentary capacity. This judgment is merely to serve as a direction to the judge re-trying the case as to the correct test that is to be applied to the evidence when he comes to consider whether the testator had the requisite testamentary capacity. Nothing we have said in this judgment is to be regarded as conclusive upon the facts or evidence led before the learned judge. Those are matters to be considered afresh by the judge re-trying the case.

We would therefore allow the appeal and order the matter to be re-tried before another judge. The deposit in court is to be refunded to the appellants. We will now hear argument on costs.

After hearing argument of counsels, we hold that this is an appropriate case in which all costs should follow the event of the re-trial. We leave it to the learned judge upon the re-trial to determine whether the costs are to be borne by the successful party or by the estate.

Appeal allowed.

Reported by Lim Lee Na